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CHARLES ELMORE C

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 506

GULF REFINING COMPANY,
Petitioner,
(*Libelant-Appellee below*),

against

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent,
(*Respondent-Appellant below*).

BRIEF FOR RESPONDENT UPON PETITION BY LIBELANT FOR WRIT OF CERTIORARI.

J. M. RICHARDSON LYETH,
Proctor for Respondent.

(Printed by Appellate Printing Co., 30 Church St., New York.)

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Supreme Court of the United States,

OCTOBER TERM, 1928.

No.

GULF REFINING COMPANY,
Petitioner
(Libelant-Appellee below),

AGAINST

THE ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent
(Respondent-Appellant below).

BRIEF FOR RESPONDENT UPON PETITION BY LIBELANT FOR WRIT OF CERTIORARI.

Statement Under Rule 25.

The opinion of the Commissioner appointed by the District Court to hear and report (R. 160-179) is reported only in 1927 Am. Mar. Cas. 1669.

In confirming the Commissioner's report (R. 181) the District Court did not write any opinion.

The opinion of the Circuit Court of Appeals reversing the District Court and the Commissioner (R. 189-194) is reported in 27 Fed. (2d) 678, and 1928 Am. Mar. Cas. 1371.

The decree of reversal and order for mandate of the Circuit Court of Appeals was filed on July 24, 1928 (R. 195).

Jurisdiction of this Court is invoked under the Act of February 13, 1925.

Argument.

The respondent favors the granting of a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit, which reversed a decree in favor of the libelant by the United States District Court for the Southern District of New York, for the following reasons:

I. There is a clear conflict in the decisions of the Circuit Court of Appeals for the Second and Ninth Circuits. *British & Foreign Marine Insurance* v. *Maldonado Co.*, 218 Fed. 744 (9 C. C. A.) cannot be distinguished from the present case, and that decision is directly opposite to that of the Circuit Court of Appeals for the Second Circuit, in this case. Briefly stated, the present case presents the question whether an underwriter of cargo, when the actual value of the cargo exceeds the insured value, must pay all the general average charges of such cargo or only such proportion of such charges as the insured value bears to the actual value. The latter was the decision of the court below. Respondent, of course, believes that this decision is right. It conforms to the law of England and of practically every other maritime nation in the world (R. 153) and to the law of the State Courts of Massachusetts. But respondent believes that it is to the advantage, not only of its own business but of marine underwriters on cargo generally, and to the advantage of merchants dealing in foreign and coastwise trade, that the law of the United States should be settled by a decision of this Honorable Court rather than that the conflict between the Second and Ninth Circuits should be allowed to stand. Respondent insures cargoes consigned to and from every port in the United States. Cases are constantly arising on such cargoes, insured by it, which present the question involved in this case. The law of the ports of Boston and New York is settled in accordance with the decision below. The law of the port of San Francisco and other Pacific ports is settled, by the *Maldonado* case, contrary to the decision below. There is probability of dispute with respondent's assured when the question arises in the Atlantic ports south of New York and

all of the Gulf ports and the Great Lakes ports. No lawyer can foretell which rule the Federal Courts of the other seven Circuits will follow. Frequently the amount involved in connection with a single shipment will not justify litigation, although in a large general average case the aggregate amounts involved in this question on all shipments would be very considerable. Therefore, if the question is not settled by this Honorable Court the respondent and other marine underwriters will be subject to harassing disputes with their assured, which will be exceedingly difficult to settle even by litigation.

II. The law, practice and custom of England, France, Germany, Holland, and Japan, are in accord with the decision of the court below in this case (R. 153). This Court has stated that in matters of mercantile and maritime nature, and especially in cases of marine insurance, it is highly desirable that if possible the law of the United States and of England should harmonize.

The Eliza Lines, 199 U. S. 109, at p. 128;
Queen Ins. Co. of America v. *Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487.

Respondent is most desirous that the laws of the two countries should harmonize (in other words, that this case should be affirmed by this Honorable Court); but even if that cannot be, respondent desires that the law of the United States should be uniform for all its ports.

For the foregoing reasons, the respondent requests this Honorable Court to grant the writ of certiorari for which the libelant has petitioned, and prays this Court to hear the appeal and render a decision which shall settle the law throughout the United States.

Respectfully submitted,

J. M. Richardson Lyeth,
Proctor for Respondent.

New York City, October 22, 1928.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1921.

No. 306.

GULF REFINING COMPANY,
Petitioner
(Libelant-Appellee below),

against

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent
(Respondent-Appellant below).

BRIEF IN BEHALF OF RESPONDENT.

J. M. RICHARDSON LYETH,
Proctor for Respondent.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 506.

GULF REFINING COMPANY,
Petitioner,
(Libelant-Appellee below),

AGAINST

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent,
(Respondent-Appellant below).

BRIEF ON BEHALF OF RESPONDENT.

Statement.

This case comes up on writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit which reversed the final decree of the United States District Court, Southern District of New York, in favor of the libelant in this suit.

The opinion of the Commissioner appointed by the District Court to hear and report on all issues is reported only in 1927 Am. Mar. Cas. 1669 (R. 160-179).

The District Court confirmed the Commissioner's report without opinion (R. 181).

The opinion of the Circuit Court of Appeals, reversing the District Court and the Commissioner, is reported in 27 Fed. (2d) 678 and in 1928 Am. Mar. Cas. 1371.

The parties will be described as they were in the District Court.

The Facts.

The libelant seeks recovery against the respondent under a policy of war risk insurance on cargo by reason of general average contribution assessed against said cargo.

The facts relative to the voyage, disaster, general average expenses, sacrifices and contributory values were admitted by stipulation, and the general average statement itself was not questioned (R. 152-160). The insured cargo almost doubled in value during the course of the voyage, and consequently the insured value was approximately one-half the value used in the general average statement, customarily called the contributory value.

The insured cargo of gasoline was shipped on the S. S. *Gulflight* at Port Arthur, Texas, in April, 1915, to be transported to Rouen, France. During the voyage, the steamer was torpedoed by a German submarine. The crew abandoned the vessel, but she was subsequently towed into St. Mary's Harbor in the Scilly Islands. To lighten the vessel and enable her to proceed to destination, part of the cargo was discharged and sold at great sacrifice, and, after temporary repairs had been effected, the *Gulflight* resumed the voyage with convoy and assistance, arriving at Rouen on June 13th.

The general average statement is not part of the record, but the figures material to this litigation are set forth in a stipulation (R. 152-4). The following is a summary of the general average statement:

Total general average charges			$129,225.43
Contributing values:			
Vessel	$590,000.00		
Add amount made good	569.45	$590,569.00	
Freight at risk	68,741.33		
Less wages & port charges	2,102.96		
Add amount made good	23,845.41	90,484.00	
Cargo	312,866.02		
Add amount made good	104,312.62	417,178.00	
Total contributory values			$1,098,231.00

The proportion of general average was, therefore, 129,225.43/1,098,231 or 11.76669%.

The general average contribution found due from the cargo was 11.76669% of $417,178 or $49,088.04. This general average contribution was paid by the libelant as of February 24, 1916, and the said amount made good to cargo of $104,312.62 was received by libelant as of February 24, 1916. In other words, the libelant was entitled to a net credit in general average of the difference between $104,312.62, the value of the cargo sacrificed, computed at the market value at Rouen, and $49,088.04, the contribution from the whole cargo, computed at the same market value at Rouen, viz., $55,224.58. The insured value of the cargo was $212,000, as compared with the contributory value of $417,178. The respondent insured $27,690 valued at said $212,000.

The Question.

The libelant claims that the underwriters collectively insuring its cargo at a value of $212,000 are liable for the whole of the general average contribution.

The respondent claims that the underwriters collectively are liable only for that proportion of the general average contribution which the insured value bears to the contributory value. The result of that proportion should again be

multipled by $27,960/$212,000 to obtain the sum for which the libelant claims it was liable under its policy. The arithmetic is slightly complicated, but the claims of the respective parties may be reduced to the following figures:

The respondent admits and has paid $49,088.04/$417,178 × $27,690 or $3,258.25. The libelant claims that respondent is liable to pay $27,690/$212,000 × $49,088.04 or $6,411.54. The amount, therefore, in dispute is $3,153.29.

The mathematical complications arising from the fact that there were several underwriters on the cargo may be disregarded and the case may be considered as though there were only one underwriter insuring the entire cargo. The sole question of law, therefore, is whether an underwriter on cargo under a marine insurance policy is liable only for that proportion of a general average contribution which the insured value bears to the contributory value or whether he is liable for the whole general average contribution (assuming it does not exceed the amount insured) even though the contributory value is greatly in excess of the insured value.

The policy of insurance is printed at length on pages 155-160 of the record. It is the usual form of marine insurance policy but is restricted by endorsement of a rubber stamp in the margin so as to cover war risk only (fols. 478-9). It is admitted by both sides, however, that, in so far as the question involved in this suit is concerned, there is no difference between the law applicable to war and marine insurance and that consequently cases involving marine insurance are in point. Since the policy contains no express provision dealing with the question in this suit, it must be decided by reference to general principles of law.

The policy in question in this suit contains no express promise by the underwriter to pay general average and, indeed, policies of marine insurance rarely, if ever, contain any such express promise. If an assessment in general average is made against goods by reason of the operation of a peril insured against, the liability of the owner of the goods to pay

general average is viewed as the proximate result of the peril and the underwriter is consequently liable.

The object of this litigation is to have the law of the United States settled. The decision below is in direct conflict with a decision by the Circuit Court of Appeals for the Ninth Circuit in November, 1910 (*British & Foreign Marine Insurance Company* v. *Maldonado*, 182 Fed. 744, herein referred to as the *Maldonado* case). The decision below of the Circuit Court of Appeals for the Second Circuit conforms to the English law and to the law and practice prevailing in the other principal maritime nations of the world, and also conforms to the law of the state courts in Massachusetts.

Definitions.

Particular average, in the language of marine insurance, is a term designating any partial loss which is not the result of an intentional sacrifice for the safety of the common adventure.

General average is a loss which is a result of an intentional sacrifice for the safety of all the interests at risk in the common adventure of the voyage.

General average statement is the computation of the payments, usually referred to as contributions and credits in general average, which are to be paid and received in order to distribute the general average losses pro-rata among all interests saved by the general average sacrifice.

Contributory value is the value upon the basis of which the general average contributions to be paid and received are computed; in the case of cargo this value is the market value of the goods at destination plus the amount, if any, to be made good in general average.

Libelant's rule: As a matter of convenience in referring in this brief to the rule of law contended for by the libelant,

to the effect that marine underwriters should be liable to pay the entire amount of general average contribution assessed against the cargo insured, regardless of whether the actual market value exceeds the agreed value stated in the policy, this rule will be referred to as "libelant's rule." This is the rule which the libelant has referred to in its brief as the "rule of full indemnity."

Respondent's rule: Likewise, as a matter of convenience in referring in this brief to the rule of law contended for by the respondent, to the effect that marine underwriters should be liable to pay only such proportion of the general average contribution assessed against the cargo insured as the agreed value stated in the policy bears to the actual market value of the goods, this rule will be referred to as "respondent's rule." This is the rule which the libelant has referred to in its brief as the "rule of co-insurance."

Digest of Laws and Decisions.

The laws of the leading maritime nations of the world, viz., England, France, Germany, Holland and Japan, are in accord with respondent's rule (R. 152-4).

English Decisions.

The English law is settled in accord with respondent's rule with respect to both hull and cargo insurance.

Steamship Balmoral Co. v. *Martin*, 1902 Appeal Cases, 511.

Arnould Marine Insurance, Section 1005 (11th Ed., p. 1307).

Marine Insurance Act, 1906, Section 73.

With respect to particular average, the English law seems to have different rules for hull and cargo. The rule as to

cargo follows the universal practice and is in accord with respondent's rule. *Lewis* v. *Rucker*, 3 Bur. 1167.

In the case of particular average loss on hull the rule in England is that the underwriter shall pay the cost of repairs irrespective of any difference between the insured value and the actual value of the vessel. *Marine Insurance Company, Ltd.* v. *China Trans-Pacific S. S. Co., Ltd.*, 11 Appeal Cases 573; *Lohre* v. *Aitchison*, 4 Appeal Cases 755; but see *Pitman* v. *Universal Marine Insurance Company*, 9 Q. B. D. 192.

Massachusetts Decisions.

In Massachusetts, with respect to hulls, the law as to general average follows the English rule as enunciated in the *Balmoral* case and is in accord with respondent's rule. *Clark* v. *United Fire and Marine Insurance Company*, 7 Mass 364, 375. We have been able to find no Massachusetts case dealing with particular average on hulls.

With respect to cargo the Massachusetts rule as to general average contributions is in accord with respondent's rule. *Clark* v. *United Fire and Marine Insurance Company (supra)*. With respect to particular average on cargo the rule is also in accord with respondent's rule. *Forbes* v. *Manufacturer's Insurance Company*, 1 Gray 371 (374).

New York Decisions.

In New York the rule with respect to *hull* insurance is contrary to respondent's rule both with respect to particular average and general average.

PARTICULAR AVERAGE:

International Nav. Co. v. *Atlantic Mutual*, 100 Fed. 304 (referred to as the *St. Paul* case).

The St. Johns, 101 Fed. 469.

Columbia Trust Co. v. *Norske Lloyd Insurance Co.*, 100 N. Y. Misc. 550—aff'd 229 N. Y. 556.

GENERAL AVERAGE:

Providence S. S. Co. v. *Phoenix Insurance Co.*, 89 N. Y. 559.

International Nav. Co. v. *Atlantic Mutual Insurance Co.*, 100 Fed. 304.

International Nav. Co. v. *Sea Insurance Co. Ltd.*, 129 Fed. 13 (C. C. A., Second Circuit).

With respect to *cargo*, the New York rule as to particular average is in accord with the respondent's rule. *International Nav. Co.* v. *Atlantic Mutual Insurance Co.* (*St. Paul* case), *supra*; *Lawrence* v. *New York Insurance Co.*, 3 Johnson's Cas. 216.

The New York rule as to general average on cargo is the question in this case.

We have appended a diagram showing the laws of England, Massachusetts and New York, divided vertically between hull and cargo, and in each case divided horizontally between particular average and general average.

Maldonado Decision.

British and Foreign Marine Insurance Company v. *Maldonado Company*, 182 Fed. 744 (C. C. A., Ninth Circuit, November 1, 1910). In that case the libelant procured from the respondent insurance commpany insurance on a cargo of kapok against perils of the sea, including general average contributions payable by the goods insured. Fire broke out on the voyage and the vessel was stranded and water pumped into the holds. After necessary repairs she proceeded to San Francisco.

The insured value of the cargo was approximately $48,000 and the contributory or arrived market value was approximately $66,000. The share due from the cargo was $22,000 but the underwriter contended that it was liable only for

that proportion of $22,000 which the insured value bore to the contributory value. The Circuit Court of Appeals held that the underwriter was liable for the whole of the general average contribution. The opinion contains a full discussion of the decisions and of the conflicting rules in the various jurisdictions. It purports to determine what is the New York rule with respect to cargo insurance and then determines that the law of the Port of San Fancisco should follow the New York rule. Three reasons appear to govern the decision: (1) The insurance value in the policy constitutes an estoppel against the underwriter and prevents him from ever asserting that the subject insured has a different value; (2) That the underwriter's contention operates only for the benefit of the underwriter and never for the benefit of the assured; (3) The language of the policy should be strictly construed against the underwriter and since no express stipulation covering the question is contained in the policy it should be resolved against the underwriter.

Opinions Below in the Present Case.

The Commissioner's report, which the District Court affirmed without opinion, followed in general the reasoning of the opinion of the Circuit Court of Appeals for the Ninth Circuit in the *Maldonado* case (*supra*).

Judge Learned Hand, in writing the opinion for the Circuit Court of Appeals for the Second Circuit in the present case, held that the liability of an underwriter to reimburse an insured for a general average assessment was similar, in legal nature, to the liability of the underwriter for a particular average loss, and that the same considerations of fairness which imposed proportionate liability for a particular average loss operated equally to impose a similar liability for general average. Such considerations of fairness were based

principally upon the rule that the extent of the underwriter's liability in the case of a partial loss should be proportioned to the agreed value stated in the policy and that, therefore, in a case where the market value exceeded the agreed value, the owner was in effect, to the extent of such excess, a co-insurer.

POINT I.

In the case of a particular average loss under a valued policy of insurance on cargo, the owner is co-insurer with the underwriter as to the excess value existing in fact over and above the insured value.

In marine policies on cargo which do not contain an agreed value, the underwriter is liable in case of a particular average loss only for such proportion of the loss as the prime cost bears to the sound value.

Usher v. *Noble*, 12 East 639;
Clark v. *United etc. Company*, 7 Mass. 365.

The practice of inserting in policies an agreed value arose in order to avoid the trouble incident to proof of prime cost, i. e., the value at time of shipment. The prime cost was, therefore, agreed upon in advance and was inserted in the policy in the form of an agreed value. *Lewis* v. *Rucker*, 3 Burr 1167.

The same general procedure is followed in computing the liability of an underwriter for a particular average loss to cargo under a valued policy as under an unvalued or "open" policy; in each case the percentage of damage to the goods is computed by reference to the damaged and the sound value

of the goods and the underwriter is held liable to pay such percentage either of the prime cost or of the agreed value, as the case may be.

It is thus a fundamental rule in the law of marine insurance that the liability of an underwriter on a valued policy on cargo cannot be affected by fluctuation in the market value of the cargo. If the cargo is damaged to the extent of one-half its value, the underwriter is liable for one-half the insured value, no matter what the market value of the cargo at destination would have been. The universal rule as to the settlement of particular average losses on cargo carries out this fundamental idea in the most practical method possible. The damaged cargo is sold at destination. The sound value of the cargo in the same market is determined and thereby the proportion or percentage of loss is arrived at. The insured value is multiplied by this percentage and the result is the loss payable by the underwriter. This rule is universally applied in practically every maritime nation in the world. It apparently had its origin in England in *Lewis* v. *Rucker*, 3 Bur. 1167 (1761). See also *Johnson* v. *Sheddon*, 2 East 580 (1802). The following cases establish the rule in this country:

International Nav. Co. v. *Atlantic Mutual Insurance Co.*, 100 Fed. 305 at 317, 318, 324, S. D. N. Y. 1900.

London Assurance v. *Companhia de Moagens*, 167 U. S. 149 (1896).

Lawrence v. *New York Ins. Co.*, 3 Johns. Cases 216 (1802).

Forbes v. *Manufacturer's Ins. Co.*, 1 Gray 371 (1854).

38 Corpus Juris 1123:

"It is a general rule peculiar to contracts of marine insurance that where the value of insured's interest in the property insured exceeds the amount of the insur-

> ance, insured is deemed a co-insurer as to such uninsured part, and the underwriter is only liable for such proportion of the loss as the amount of the insurance bears to the value of insured's interest."

The purpose of this rule is to stabilize the liability of the underwriter upon the basis of the insured value. The underwriter is relieved from increased liability in the event of an increased market value, and the insured is protected against recovering less than the proper percentage of the insured value if the market value declines. Thus, if goods are insured at $100, and their market value at destination if saved would be $200, and a partial loss equal to 20% occurs, the owner has suffered a pecuniary loss of $40. On the other hand, the insurance premium was calculated upon the basis of a 20% loss making the underwriter liable only for $20, and it is unfair to hold the underwriter for more that that. In the converse case, if the market for the same goods had fallen to $50 instead of rising to $200, on principles of strict indemnity the owner should claim only $10 from the underwriter, since that was the extent of the owner's actual loss. The owner, however, had doubtless borrowed money or made other commitments on the basis of the insured value, and the underwriter had received his premium on the same basis. It is, therefore, fair that the underwriter should pay that proportion of the insured value which the amount of the loss bore to the sound value of the goods, *i. e.*, 20% or $20.

The marine underwriter insures against certain risks expressly enumerated in the policy, such as perils of the sea, or war risks, but does not and cannot insure against fluctuations in market value. The risk of changes in market value the owner of the goods must bear himself; the amount of the underwriter's liability under a valued policy should not in any event be changed by fluctuations in market value.

An underwriter can calculate upon the basis of averages the chance of a marine peril happening to a given shipment, but he cannot and does not compute the chance of a rise or fall in the market during the period that the shipment is at risk.

The purpose of an agreed valuation in a marine policy is to establish a definite value for the goods upon the basis of which all losses, either total or partial, are to be computed.

The libelant states in Point IV of its brief that "with valued policies true co-insurance arises only in cases where the assured has not taken out enough insurance to cover the whole agreed value." Unless this statement is meant as merely a quibble upon the technical meaning of words, it is certainly not sound. In the case of a total loss of goods under a valued policy where the market value of the goods exceeds the agreed value, whether by reason of original undervaluation or of subsequent increase in value, the owner is, in substance, a co-insurer in that he bears the loss to the extent that the actual value exceeds the insured value. So also where a particular average loss occurs to goods whose market value exceeds the agreed value, the owner must himself bear a portion of such loss in the proportion that the actual value exceeds the insured value.

POINT II.

General average is a partial loss which is not distinguishable in legal nature, for the purpose of cargo insurance, from a particular average loss.

The respondent contends that the same general principles should be applied to the settlement of a general average contribution on cargo as are applied to the settlement of a particular average loss. In the latter case the goods insured suffer a physical damage; in the former case the interest of some other owner suffers loss through the operation of a peril insured against, and the goods insured are subjected to a liability to contribute to make good such loss. In either event the loss is the result of the operation of a peril insured against.

Parsons Marine Insurance, Vol. II, p. 208.
S. S. Balmoral Co. v. Marten (1901), 2 K. B. 896.

The origin of general average is traditionally referred to the ancient Rhodian law which is said to have recognized jettison as general average. *Lowndes, General Average*, 6th Ed., page 1. It is now established that any sacrifice made during the course of a voyage, which sacrifice is necessary in order to avert disaster to the whole venture, i. e., to hull, cargo and also to freight, if at risk, is a proper subject of general average. Thus, if during a storm it becomes necessary as a safety measure to lighten the ship by throwing overboard some cargo, it is not fair that the owner of the cargo thus jettisoned should bear the entire loss suffered when such loss benefited both hull and other cargo, nor should the Master be placed under any duty to select for jettison a pro-rata amount of goods from each shipment on board, since that would obviously be impracticable. The Master is left free to exercise his discretion solely with regard to the safety of the ship and all on board. The selection of any particular

article of cargo as against any other article of cargo for sacrifice, however, obviously depends upon the more or less accidental fact of where the article of cargo selected for sacrifice was stowed in the hold, etc. The general average contributions which are assessed against other cargo which is saved by the sacrifice are merely in substitution for the loss which should in fairness have been imposed pro-rata on such other cargo by the sacrifice of a proportionate part of each other shipment. General average is thus merely a device for spreading a partial loss of a certain nature over all the interests at risk on the voyage which were saved by the general average sacrifice.

The average adjuster in computing the amount of contribution payable by each interest, first ascertains the aggregate contributory value of all interests, and the aggregate amount to be made good in general average; the ratio between these two amounts gives the percentage, which is then applied to the contributory value of each interest to ascertain the amount of the contribution in dollars and cents which each interest is to make. As in the case of a particular average loss, so also in the case of a general average loss the loss is thus stated as a certain percentage of the value of the goods.

To illustrate the computation of a particular average loss, assume in the present case that the same amount of gasoline which was sacrificed had been lost through leakage or some other means constituting a particular average loss and assume for the sake of simplicity that one underwriter insured the whole cargo. Assume further the same corresponding valuations as follows:

Sound market value of damaged or lost cargo, there being no salvage (This corresponds to amount made good in general average)	$104,312.62
Sound market value at destination of total cargo	417,178.00
Insured value	212,000.00

Under the universal rule the underwriter's liability would be $104,312.62 ($417,178 × $212,000, equals $53,000 (approximately). The merchant would, therefore, have sustained a loss of profits by reason of being underinsured by the difference between

Market value of lost cargo	$104,312.62
Amount receivable from underwriter	53,000.00
Insured's loss of profits	$51,312.62

In the present case, where the loss is general average, if respondent's rule is adopted by the Court, the insured's share of the general average contribution will be ($212,000 / $417,178 × $49,088.04 equals $24,544.02. This figure represents what the insured is out of pocket by reason of his under insurance and compares with the figure of $51,312.62, loss of profits in the assumed case of a particular average loss.

If the libelant's rule is adopted by the Court, the insured would bear no part of the contribution payable by his cargo.

It is submitted that there is no reason, legal, equitable or moral, why the assured should escape entirely the burden of his under insurance simply because the loss happened to occur through a general average sacrifice rather than in some other way which would give rise to a particular average loss. The benefit from the fact it was a general average sacrifice is reflected in the reduction of the burden by more than 50%, yet the effect of the libelant's rule is that the assured should benefit further by the fact that the loss occurred through a general average sacrifice and be relieved entirely of the burden resulting from under insurance. This is contrary to the fundamental purpose of general average which is to distribute the loss evenly over all interests and to remove inequalities arising from the sacrifice of one man's goods rather than another's. As a matter of fact, if any dis-

tinction is to be made between the underwriter's liability on a particular average loss and a general average sacrifice there would seem to be more equity in treating the merchant as a co-insurer in the case of a general average sacrifice because as a result of the general average statement the merchant is receiving credits on the basis of the destination value and he cannot in equity deny to the underwriter that the contribution is based on the same valuation. Yet, in fact, that is exactly what the libelant is trying to do in this case: he is trying to have his cake and eat it. For the sake of convenience in argument, let us assume in the case at bar that destination or contributory value of the cargo is exactly double the insured value. As a matter of fact the fraction $212,000/$417,178 is 50.08%. Approximately one-quarter of the cargo was lost by the general average sacrifice. The libelant has received $104,000 from general average, substantially twice the insured value of the portion lost, yet he maintains that the underwriter must bear the whole of the general average contribution which is based on a valuation double the value stated in the insurance policy and upon which the underwriter received his premium.

The injustice and inequity of the libelant's position is even more apparent if we should consider the net credit in general average. It is conceivable that the underwriter might take the position that, one-quarter of the cargo having been lost, he is liable for one-quarter of the insured value, viz., $53,000. By payment of that loss he would become subrogated to the rights of the assured in general average. The net credit in general average was $55,224.58. Therefore, the underwriter owes nothing under his policy. This is by no means a fanciful argument because one of the principal points decided by Judge Brown in the *St. Paul* case (*International Nav. Co.* v. *Atlantic Mutual Insurance Company*, 100 Fed. 304) was that an assured may sue the underwriter for the loss sustained by general average sacrifice without waiting for the general average statement.

It is respectfully submitted that this argument whereby no liability upon the underwriter results, is just as fair and equitable as the position of the libelant in this case. In the one case the underwriter would take all the benefit of the increase in value of the cargo, and the libelant, in maintaining his contention in the present case, is trying to take all the benefit of the increase in value without assuming any of the burden. Neither of these extreme positions is fair or equitable. The merchant is entitled to the benefit of the increase in market value but he must also share the burden of that increase with the underwriter because, in point of fact, he is a co-insurer with the underwriter to the extent of the difference between the destination or contributory value and the insured value. The underwriter on the other hand is not entitled to the benefit of the rise of market because he did not assume the risk of market fluctuation and, therefore, he cannot fairly be penalized by the rise in market. He should only be made to respond to the loss sustained by a peril insured against, based on the insured value upon which his premium was computed.

The libelant argues on pages 28 and 29 of its brief that the general average statement should be re-cast if the respondent's rule were to be adopted so as to reduce the contributory value of the cargo to its insured value, and then to recompute the general average distributions payable between the various interests; the underwriter then to pay the entire amount assessed against the cargo under such revised computation. This is obviously fallacious, however, for the various interests contribute to general average as among themselves upon the basis of actual market value. There is neither occasion nor justification for changing this. But in the present case this cargo was in fact underinsured, *i. e.*, insured for only a portion of its market value; it is fair, therefore, that the underwriter should reimburse the owner only for the amount of general average contribution assessed

against that portion of the value of the goods which the underwriter had insured, and that the owner should bear the loss as to the uninsured value in the same manner that the owner would have borne the loss had the loss been particular average instead of general average.

POINT III.

The law of New York was not in accord with the libelant's rule, and the practice in New York prior to the Maldonado Decision applied the respondent's rule.

The libelant, in Point Two of its brief, cites the case of *Strong* v. *New York Firemen Insurance Company*, 11 Johns. 323 (1814), as establishing the libelant's rule as the law of New York as to cargo policies.

That case has always been cited for the proposition that a general average adjustment made in a foreign port in accordance with the law of such foreign port, would bind the underwriters of the home port, although the law of the home port differed radically from the law of the foreign port. The question involved in the present case was not discussed in the opinion of the Court. The mere fact that Counsel for the underwriters in that case may have presented arguments similar to the arguments we are urging in the present case, and that the underwriters were defeated, is no basis for urging that the *Strong* case is an authority establishing the law of New York or in any way controlling upon the Circuit Court of Appeals for the Second Circuit. The Circuit Court of Appeals, below, did not regard the *Strong* case as a decision on the question involved here, as appears from the following quotation (R. 192, 193):

> "In general, therefore, it appears to us that since co-insurance is right in principle, and is admittedly the law as to partial losses, it should apply to general average contributions. We can find nothing to the contrary in

the books except *British etc. Co.* v. *Maldonado & Co.*, 182 Fed. Rep. 774 (C. C. A. 2), and an early New York case, *Strong* v. *Firemen Ins. Co.*, 11 Johns. 323, in which the chief point discussed was as to the proper place at which the adjustment should be computed. The question of whether when the amount was reached, the underwriter was liable in toto was assumed."

All of the other New York cases cited in Point Two of libelant's brief deal with hull policies.

We respectfully submit that there is no case in the State or Federal Courts of New York decisive on the question here involved.

We respectfully submit that the testimony shows conclusively that, at least up to the time of the *Maldonado* decision in 1910, the practice among underwriters in New York was to apply the respondent's rule to the settlement of general average contributions under cargo policies where the contributory value was higher than the insured value. The Commissioner found that there was no custom in New York in 1915 and 1916 respecting the settlement of general average contributions under cargo policies. He said:

"No such custom or usage was proved. It appeared that adjusters commonly based general average contributions upon contributory values without regard to policy values. But underwriters do not always pay contributions thus ascertained; if they did they collected from their assured the difference between the contributory and policy values. After the decision of the *Maldonado* case in 1910, refusals on the part of underwriters to pay on the basis of the full contributory value were less frequent" (R. 168).

The only reference in the opinion of the Circuit Court of Appeals is contained in the following clause occurring at the end of a long sentence (R. 190):

"• • • there being no authority controlling upon us, and the practice of the underwriters being largely in

dispute, at least since the decision of the Ninth Circuit in *British etc. Co.* v. *Maldonado & Co.*, 182 Fed. Rep. 744."

Although the Commissioner's report, affirmed without opinion by the District Court, and the decree entered thereon, were reversed by the Circuit Court of Appeals, we do not feel that we can properly ask this Honorable Court to review the finding that there was no such custom or usage in 1915 and 1916. However, we do claim that the testimony and the findings themselves of both the Courts below conclusively establish that there was no practice in New York recognizing the libelant's rule as set forth in the quotations from certain text writers in Point Three of libelant's brief.

On the contrary, the testimony shows conclusively that prior to the *Maldonado* decision in 1910, the practice among underwriters in New York was to apply the respondent's rule to settlements of general average contributions under cargo policies. Mr. Cornelius Eldert, President of the respondent company, who has been in the marine insurance business since 1865, testified that such a custom had existed among underwriters for fifty years (R. 18, 19). He said that it had been in practice up to the date of the decision in the *Maldonado* case, but that after that date that decision had caused some underwriters to follow its rule rather than the former custom or practice (R. 27, 28). Mr. Albert Ullman testified that he was a marine underwriter acting as agent for six companies, and that he had formerly acted for eight other companies. His experience for 35 years was that the custom and practice of applying the doctrine of co-insurance to the settlement of general average contributions under cargo policies was uniform and universal (R. 30, 31). He further testified that it was unchanged after the *Maldonado* case (R. 31, 33). Mr. John A. Jeremiah, who was in the marine insurance business from 1875 until he retired in 1910, testified that from his experience he had found the custom to be universal, and that "there was nothing else done" (R.

34-36). The testimony of Mr. Galloway C. Morris and of Mr. Andrew G. Lange (comparatively younger men) was to the same effect except that their actual knowledge and experience did not go as far back as that of the previous three witnesses.

To refute this evidence of custom established by these five witnesses, the libelant offered the evidence of two witnesses whose testimony was chiefly directed to the fact that whatever custom there may have been was largely broken up after the *Maldonado* decision in 1910.

The statements of the text writers quoted in Point Three of libelant's brief are, therefore, clearly erroneous. That the practice in New York up to 1910 was in accord with respondent's rule, is clearly established by the testimony. The finding of the Courts below merely negatives the fact that such practice and custom continued unbroken after 1910.

POINT IV.

The distinction made by the Circuit Court of Appeals between cargo and hull policies is sound, both on practical considerations and on the authorities.

The Circuit Court of Appeals, in the last paragraph of its opinion, considered the classification of the rules governing the settlement of particular average losses and general average losses to cargo and hull policies in a most logical and well-considered manner. The application of the doctrine of co-insurance to settlements of particular average losses on cargo is universal. The reason for not applying it to settlements of particular average losses on hulls is set forth in the opinion of Lush, *J.*, in the English case of *Lohre* v. *Aitchison*, 2 Q. B. D. 507, 509:

> "If ships were kept merely for sale, it might reasonably be contended that the same principle should be

applied which is applied to damaged goods. But a ship is intended to be used for profit. The owner is in many contingencies bound to repair. He has always the right to repair, and it is in the contemplation of both parties that if damage happens the ship will be repaired if it is worth the cost. If, instead of repairing, the owner chooses to sell the ship in her damaged condition, he fixes his loss at the difference between what she was worth at the commencement of the risk and what she sold for. But if he elects to repair, the loss is ascertained by the cost of the repairs, less a proper deduction on account of having new timber for old."

This language was quoted by Judge Addison Brown in the *St. Paul* case.

Thus both in England and New York in the settlement of particular average losses one rule is applied to cargo policies and the other to hull policies. We have found no cases involving particular average on hulls in Massachusetts.

In England, respondent's rule is applied to general average contributions under hull policies (*S. S. Balmoral* v. *Martin*, 1902, Appeal Cases 511), and also under cargo policies. (Marine Insurance Act 1906—Sec. 73.) The *St. Paul* case apparently fixed the rule in New York contrary to that of England with respect to the settlement of general average losses under hull policies. This Court did not pass upon the *St. Paul* case (except to deny certiorari) and that decision on this point is not necessarily sacred or inviolate. It conflicts with the rule, not only in England, but in Massachusetts. *Clark* v. *United Fire & Marine Insurance Company*, 7 Mass. 364, 375. The reason for differing rules between hull and cargo policies is not so cogent when applied to settlements of general average contributions as it is when applied to particular average losses. In a particular average loss on hull, there is no necessity for ascertaining the ship's value; repairs are simply effected and the cost is charged against the underwriter. But in the ascertainment of a general average contribution, the value of the vessel

must of necessity be ascertained and a difference in valuation of the vessel is directly reflected in the amount of the general average contribution.

However, the question as applied to settlements under hull policies is not involved in this case. The Circuit Court of Appeals properly considered that the New York law was settled that libelants' rule should be applicable to hull policies with respect both to particular average and general average. The respondent's rule being universally applied to settlements of particular average under cargo policies, the question of classification for the Circuit Court of Appeals was whether the same rule should be applicable to general average contributions under cargo policies or whether libelant's rule, applied to general average on hulls only in the *St. Paul* decision, should be dragged over into cargo policies.

The decision below obviously has the advantage of simplicity in application,—one rule applied to hull policies and the other rule applied to cargo policies. Furthermore, we believe that the settlement of particular average losses under hull policies is the one anomalous case to which the libelant's rule should be applied, on the ground that in such cases only does the value of the vessel have no bearing whatever on the amount chargeable to the underwriter. Therefore the libelant's rule should not be extended to cargo policies at all; it really should not apply to general average under hull policies.

The libelant argues that general average contributions under cargo policies are in their nature exactly similar to particular average losses under hull policies; in each case the assured is obliged to pay a sum of money, in the one case to get his ship repaired and in the other, to get his cargo released from the lien of general average.

In the first place, this argument is not applicable to the facts of the present case. Here, approximately one-fourth of the libelant's cargo was sacrificed, and he actually received

from general average a great deal more than the amount of the contribution due from his cargo. Here, instead of having to pay money to release the cargo from the lien of general average, his very considerable profits on the transaction were somewhat lessened by the general average contribution.

Libelant's argument could only be applicable to a case where the cargo was entirely undamaged by any general average sacrifice and was assessed general average contributions without receiving any credits. Even in such a case, the distinction from particular average settlement under a hull policy is obvious. The value of the cargo is an important factor in determining the amount of the general average contribution, whereas the value of a vessel has no bearing on the cost of the repairs of a particular average loss.

POINT V.

The libelant's rule is not sound and should not be adopted by this court.

A. The presence of an agreed value in the insurance policy is not an estoppel.

One of the chief grounds of the decisions in the *Maldonado* case (*supra*), the only decision in the United States squarely in favor of the libelant, is that the underwriter is estopped to claim that the cargo has any other value than the insured value. It is respectfully submitted that this argument is fallacious.

The fact is that the agreed valuation in a cargo policy is not an estoppel of any kind. It is simply an agreement between the parties that for the purpose of computing a loss under the policy the cargo shall be valued at the figure stated in the policy. If, in fact, the value is greater, either party is at liberty to show that fact, but in computing the loss, it must be related back to the insured value. In a particular

average loss on cargo the underwriter is clearly not estopped to show the actual value. The percentage of loss is arrived at by determining the sound and damaged values in the market at destination and applying that percentage to the insured value (Point I, *supra*). The mere fact that the damage to the insured cargo happens to be recoverable in general average cannot impose an estoppel upon the underwriter. And even when the insured cargo is undamaged but is compelled to contribute, there is no reason for imposing an estoppel.

In fact, if there were any estoppel, it ought to operate against the assured, for he is the one who makes the representation as to value, and the underwriter acts on that representation in fixing the premium.

The effect of agreed value has come up for consideration also in determining whether an assured may abandon as for a constructive total loss. If a vessel be damaged so that the cost of repairs will exceed 50% of her value, the owner may abandon as for a constructive total loss. If the policy contains an agreed value the question arises whether the cost of repairs must be judged with reference to such agreed value or with reference to the ship's actual value. The Supreme Court of the United States has adopted the latter rule. *Patapsco Insurance Company* v. *Southgate*, 5 Pet. 604. In *Bradlie* v. *Maryland Insurance Company*, 12 Pet. 378, Judge Story, in approving of the rule laid down in *Patapsco Insurance Co.* v. *Southgate*, that the actual value of the ship at the time and place where the injury occurred was the proper test, said:

> "It follows from this doctrine that the valuation of the vessel in the policy, or the value at the home port or in the general market of other ports consitutes no ingredient in ascertaining whether the injury by the disaster is more than one-half the value of the vessel or not."

In *Peele* v. *Merchants Insurance Company*, 19 Fed. Cas. No. 10905, Judge Story also said:

> "Upon the first point it is contended by the defendant's counsel that the valuation in the policy is conclusive and affords the only just means of ascertaining the value, it being, as between the parties, the agreed value of the ship. The plaintiffs deny this doctrine and insist upon the actual value at the time of the loss as the true value. Nothing is more familiar or more clearly settled than the doctrine that the valuation in the policy is conclusive in case of a total loss; but it is inapplicable for the purpose of ascertaining the quantum of injury (for it is quite another question as to the quantum of payment to be made by the underwriters) in case of a partial loss of goods."

English Marine Insurance Act, 1906, Section 27, paragraph 4, provides:

> "Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss."

The above cases, therefore, show that an agreed value in a policy is in no sense an estoppel but merely a basis to which losses must be referred. If there is an actual total loss the agreed value is paid in full, but if there is not an actual total loss the percentage of the loss actually occurring is ascertained and applied to the agreed value. Any other method works unfairly either to the underwriter or to the assured in case the insured and the actual values do not coincide.

The argument that the respondent's contention operates only for the benefit of the underwriter and never for the benefit of the assured is likewise unsound. In a particular average loss, if the price of the goods has fallen during the voyage the assured benefits by the insured value. The percentage of loss, ascertained by comparing the damaged and sound destination values, is applied to the higher insured values. In the case at bar, if the gasoline had declined in value the assured could have claimed immediately against

the underwriter, as for a particular average loss, the value of the gasoline sacrificed at the insured value. The underwriter would have paid the general average contribution out of the credits received. Thus the assured would have benefited by the insured value in a declining market. Furthermore, Mr. Eldert testified that in cases where the respondent has paid for a general average sacrifice, and later has received general average credits based on a value higher than the insured value, the respondent has refunded to the assured the proportion due to the increased value although the recovery was much less than the loss paid (fol. 353).

The Maldonado decision also touched upon the argument that since no clause had been inserted in the policy expressly limiting the underwriter's liability, the general rule that language in an insurance policy should be construed against the respondent would come into operation. In the case at bar the policy contains nothing whatever in regard to the liability of the underwriter for general average contributions. Clearly, the general rule of construction cannot be invoked against the appellant in this case where its liability for general average contributions is not based on any express language but is implied by law.

If language be used that is ambiguous, the usual rule is to resolve the ambiguity against the underwriter, but, in a case where there is no provision whatever in the policy relating to the question, the intent of both parties is obviously to leave that entire matter to the law to determine the extent or existence of liability. 32 C. J. 1152. The question then becomes simply a matter of determining what the existing law provides.

The libelant's rule does violence both to justice and the equitable purposes upon which general average is based in requiring the underwriter to pay the whole general average charges where the underwriter had at stake only the insured value, which was much less than the market or contributory value. The cargo owner who actually had at risk the difference between the market or contributory value and

the insured value, under the libelant's rule, escapes entirely the equitable burden of his contribution in general average although he receives and retains all the benefits, including in some cases, notably the case at bar, actual general average payments or credits based upon the higher value of his cargo.

B. The Libelant's rule would result in anomalous situations.

One test of the soundness of a rule of law is whether it reaches sound results as applied to various related situations. This test as applied to the libelant's rule shows that it produces anomalous results, whereas the rule put forward by the respondent produces uniform and consistent results.

(1) It has already been shown above in Point I that it should make no difference whether the goods insured suffer particular average or general average loss; in either case the liability of the underwriter should be the same. Under the respondent's rule this result would be reached, but under the libelant's rule there would be a difference of 50% in the result as applied to the facts of this case.

(2) Suppose that the owner not only insures his goods for the full amount of the insured value, but also takes out profits insurance to cover the increase in market value between the time of shipment and time of arrival. In the event of a particular average loss to the goods, the profits underwriter pays a partial loss in proportion to the percentage of the damage or loss to the goods.

Loomis v. *Shaw*, 2 Johns. Cas. 36.

In the absence of an express clause in the policy to the contrary, a profits underwriter should contribute to a partial loss which is general average. But if that is so, then the payment of a portion of general average by the profits underwriter should cut down by that much the loss recoverable by

the assured from the original underwriter, for the owner obviously cannot recover his loss twice. On the other hand, the amount of the loss payable by the original underwriters should not vary according to the presence or absence of profits insurance; the profits underwriter should be in the same situation as the owner in this respect.

(3) A situation may very easily be assumed where the actual value of the goods exceeds the insured value, and the general average contribution is sufficiently large, computed as it is on the basis of the market value, that it would equal the amount of the insured value. Thus to take the figures of the present case: insured value of cargo $212,000; actual market value of cargo at destination, $417,178. A proportion of contribution in general average of approximately 51% would therefore have equalled the whole insured value. There is, therefore, presented the anomalous situation of a partial loss of approximately one-half the actual value of the goods imposing an obligation upon the underwriter to pay an amount equal to a total loss; and the amount of the loss payable by the underwriter would not be changed by any increase in the percentage of contribution from 51% to 100%. If the percentage of contribution rose to 60%, there would be a partial loss which the assured could not recover in full because it would have exceeded in amount a total loss!

Moreover, as pointed out above, had the particular goods insured been sacrificed instead of some other goods, there would have been as to these goods a particular average loss, and the insured could only have recovered that portion of the insured value which the percentage of physical loss or damage bore to the insured value. This is contrary to the fundamental purpose of general average which is to distribute the loss evenly over all interests and to remove irregularities due to one man's goods having been sacrified rather than another's.

C. The affirmance of the decision by the Circuit Court of Appeals in this case would not make the insurer's policy misleading to the assured.

The libelant contends in Point VI of its brief that the decision of the Circuit Court of Appeals makes a marine insurance policy misleading to an assured because he has no notice upon the face of the policy that he is not fully covered for all general average contributions in the event that the goods increase in value. Such a contention is, however, obviously unsound. It might equally well be urged that the present rule as to the manner of computing the liability of an underwriter for a particular average loss under a valued cargo policy should be changed because the policy does not on its face expressly call attention to such rule of law. But this argument of the libelant is also self-destructive; for there is no express promise by the underwriter to pay general average at all, and by a similar course of reasoning the assured should not therefore expect any reimbursement for general average losses! It is simply a situation where the assured or his assignee must know the law; there are many similar situations where the existence, or the extent, of the liability of a marine underwriter are not expressly stated in the policy.

In Point VII of libelant's brief it also urges that the decision of the Circuit Court of Appeals is wrong because the contract should be construed in the light of the decisions at the time of its execution. We have attempted to show, however, in the digest of decisions which precedes Point I of this brief, that there was no decision squarely in point which was controlling upon the court below. The Circuit Court of Appeals for the Second Circuit also took this view of the matter (R. 190).

POINT VI.

In questions of marine insurance where there is no binding adjudication, the English law should be followed in order that there may be a uniform rule.

Many of the troublesome questions which have arisen in marine insurance have been decided in England, and it is desirable to have the law in the United States in harmony with the English law. The English precedents on many questions have been established for years and are usually accepted as controlling in the absence of decisions in the United States. In order that the law construing insurance policies in the United States may be uniform with the English law, it is important, in making a decision which will become a binding precedent, not to depart from the settled law and practice of England and create a different law of our own. This is particularly so, where the correct legal principle is on the side of the English rule.

In the opinion in the *"Eliza Lines"*, 199 U. S. 119, at page 128, Judge Holmes said:

> "Of course it is desirable, if there is no injustice, that the maritime law of this country and of England should agree."

In the case of *Queen Ins. Company of America* v. *Globe & Rutgers Fire Ins. Co.* ("The Napoli"), 263 U. S. 487, a vessel proceeding in a convoy without lights collided with another vessel proceeding in another convoy in a similar manner in the Mediterranean Sea. The question was whether the loss was covered by the marine or by the war risk insurance policy. Justice Holmes said in his opinion, page 493:

> "There are special reasons for keeping in harmony with the marine insurance laws of England, the great

> field of this business, and as we could not reverse the decision below without overruling *Morgan* v. *United States*, we are of the opinion that the decree of the Circuit Court of Appeals must be confirmed."

The Court followed *Britain S. S. Company* v. *King*, 1921, 1 A. C. 99, holding that the loss was caused by a marine risk.

In the case of *Porter* v. *Bank Line, Ltd.*, 17 Fed. 2nd 513, libels were filed against the owners of the *Poleric* to recover over $3,000,000 damages to cargo. The Court said in its opinion:

> "The bills of lading were issued by a British ship in a British Colonial Port. For this reason and also because it is important that the decisions of American Courts in matters of commercial law should conform to the English decisions, in the absence of some rule of public policy which would forbid (*The Turret Crown*, 297 Fed. 766), it is proper to ascertain the interpretation of similar clauses by the English Courts."

The decision of the District Court was affirmed by the Circuit Court of Appeals for the Fourth Circuit, but without express reference to this point, 25 Fed. 2nd 843.

So also in the case of *Borland, as Receiver*, v. *Standard Marine Insurance Co., Ltd.* ("The Rensselaer"), 1925 Am. Mar. Cas. 116 (App. Term, N. Y. Sup. Ct., 1st Dept., May, 1925), the Court followed an English decision holding that a clause in a marine insurance policy insuring against "damage to machinery through a latent defect" did not cover the cost of replacing the defective part. The Court reached this decision, although there had been a decision to the contrary on the point in the United States District Court for the Southern District of New York.

American courts have been anxious to keep the American law in harmony with English law on mercantile and commercial subjects, such as marine insurance, not only because of the fact that our law was derived from the English common law, but also, and principally, because of the large

amount of trade and commerce passing between the two countries and the resulting inconvenience and loss to merchants and business men in cases where the rules of the two countries are different.

Virtually every sale of goods, which are transported by water, involves a transfer of marine insurance. This makes it important for the American courts to keep their decisions on such subjects uniform wherever possible with the decisions of other important commercial and maritime countries. Courts of admiralty particularly have always been very careful to examine and consider the rules of law of other maritime countries before rendering a decision in their own forum. In the situation now before the court the respondent's rule is uniformly established in all the more important maritime and commercial nations of the world, viz., England, France, Germany, Holland and Japan (R. 153).

POINT VII.

The decree of the Circuit Court of Appeals for the Second Circuit should be affirmed with costs.

Respectfully submitted,

J. M. Richardson Lyeth,
Proctor for Respondent.

	HULL	CARGO
England	*Particular Average:* *Lohre v. Aitchison*, 4 Appeal Cases 755. (House of Lords, 1879). *Marine Insurance Company, Ltd v China Transpacific S. S. Co., Ltd.*, 11 Appeal Cases 573. Contra respondent's contention. *General Average:* *Steamship "Balmoral" v. Martin*, 1902 Appeal Cases 511 (House of Lords). Supports respondent's rule.	*Particular Average:* *Lewis v. Rucker*, 3 Bur. 1167. Supports respondent's rule. *General Average:* Arnould—Marine Insurance, Sec. 1005 (11th Ed.), pages 1307, 1308. Marine Insurance Act (1906), Section 73. Supports respondent's rule.
Massachusetts	*Particular Average:* No cases found. *General Average:* *Clark v. United Fire and Marine Ins. Co.*, 7 Mass. 364, 375. Supports respondent's rule.	*Particular Average:* *Forbes v. Manufacturers' Insurance Co.*, 1 Gray 371, 374 (1854). Supports respondent's contention. *General Average:* *Clark v. United Fire and Marine Ins. Co.*, 7 Mass. 364, 375. Arnould Marine Insurance, Sec. 1006 (11th Ed.), page 1311 note. Supports respondent's rule.
New York	*Particular Average:* *International Nav. Co. v. Atlantic Mutual Ins. Co.*, 100 Fed. 304 (referred to as St. Paul case). *The St. Johns*, 101 Fed. 460. *Columbia Trust Co. v. Norske Lloyd Ins. Co.*, 100 N. Y. Misc. 550—aff'd 229 N. Y. 556. Contra respondent's rule. *General Average:* *Providence and Stonington S. S. Co. v. Phoenix Ins. Co.*, 89 N. Y. 559. *International Nav. Co. v. Atlantic Mutual Ins. Co.*, 100 Fed. 304. *International Nav. Co. v. Sea Ins. Co., Ltd.*, 129 Fed. 13 (C. C. A., Second Circuit). Contra respondent's rule.	*Particular Average:* *International Nav. Co. v. Atlantic Mutual Ins. Co.*, 100 Fed. 304, at 323-325 (dictum). *Lawrence v. New York Ins. Co.*, 3 Johns. Cases 216 (1802). Supports respondent's rule. *General Average:* The case at bar.